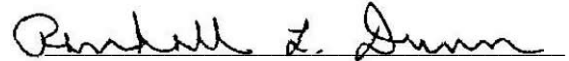


Below is an Opinion of the Court.



RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	
	)	
Aircraft Investor Resources, LLC,	)	
as consolidated with <i>In re Epic,</i>	)	Bankruptcy Case
LLC (09-40041-rld7) and <i>In re</i>	)	No. 09-38458-rld11
<i>Aircraft Completion Services, LLC</i>	)	
(10-30185-rld7)	)	
	)	
Debtor.	)	
	)	
LT Builders Group, LLC,	)	Adv. No. 10-03246
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM OPINION
	)	
Blue Sky AvGroup, LLC, a Florida	)	
limited liability company, and	)	
Johan Charl Brink, an individual,	)	
	)	
Defendants.	)	

Following the hearing ("Hearing") on plaintiff LT Builders Group, LLC's ("LT Builders") Motion for Partial Summary Judgment ("Summary Judgment Motion") on April 28, 2011, among the matters taken under advisement were: 1) LT Builders' Motion to Strike Portions of

1 Declaration of Richard Lucibella ("Lucibella Motion to Strike"); 2) LT  
2 Builders' Motion to Strike Declaration of David Hice ("Hice Motion to  
3 Strike"); 3) LT Builders Motion to Strike Paragraph 18 of Declaration of  
4 Ashley Emerson ("Emerson Motion to Strike"); and 4) Defendants Blue Sky  
5 Avgroup, LLC's ("Blue Sky") and Johan Charl Brink's ("Brink") Motion to  
6 Strike Declaration of Kenneth Eiler and Supplemental Declarations of  
7 Christa A. Thornton-Smith and Douglas King ("Defendants' Motion to  
8 Strike).

9           Based upon my review of the subject declarations, motions and  
10 supporting memoranda, as well as consideration of applicable legal  
11 authorities, I have come to a decision on the various motions to strike.  
12 This Memorandum Opinion sets forth the court's findings of fact and  
13 conclusions of law under Federal Rule of Civil Procedure 52(a),  
14 applicable with respect to these contested matters under Federal Rules of  
15 Bankruptcy Procedure 7052 and 9014. I will start with my determinations  
16 regarding the Defendants' Motion to Strike and will continue with  
17 individual determinations regarding each of LT Builders' motions to  
18 strike.

19 A) Defendants' Motion to Strike

20           Blue Sky and Brink argue generally that the Declaration of Ken  
21 Eiler and the Supplemental Declarations of Christa A. Thornton-Smith and  
22 Douglas King should be stricken because they were filed in conjunction  
23 with the Reply to Defendants' Opposition to Motion for Partial Summary  
24 Judgment, and to the extent they raised new evidence and/or information,  
25 they improperly deprived Blue Sky and Brink of an opportunity to respond.  
26 I will deny Defendants' Motion to Strike as it applies in general to the

1 three declarations for the following reasons.

2 First, following LT Builders' filing of the Summary Judgment  
3 Motion and supporting documents, the defendants deposed Ms. Thornton-  
4 Smith and used excerpts from her deposition and the exhibits to her  
5 deposition as support for their opposition to the Summary Judgment  
6 Motion. It was neither improper nor unfairly prejudicial nor unexpected  
7 for LT Builders to include countering information in the Declarations of  
8 Kenneth Eiler, Douglas King and Ms. Thornton-Smith filed in conjunction  
9 with LT Builders' Reply.

10 In addition, there is nothing new or surprising in the subject  
11 declarations based on the arguments and evidence advanced by LT Builders  
12 originally in support of the Summary Judgment Motion. I do not find that  
13 Blue Sky or Brink was unfairly prejudiced or surprised by the information  
14 generally in the subject declarations. See Pacific Capital Bancorp, N.A.  
15 v. East Airport Dev't, LLC (In re East Airport Dev't, LLC), 443 B.R. 823  
16 (9th Cir. BAP 2011). There is a reason why the pleadings with respect to  
17 a motion generally are limited to the motion and supporting papers, the  
18 response and supporting papers, and the reply and supporting papers. If,  
19 particularly in a case of this type, every time a new declaration or  
20 affidavit was filed, it triggered a right to a surreply, the surreplies  
21 could go on to infinity. Extending further opportunities to respond  
22 should and must be limited to situations where a party has been unfairly  
23 or improperly prejudiced by the submission of new evidence with a reply.  
24 I find no such unfair or improper prejudice with respect to the  
25 Declaration of Kenneth Eiler and the Supplemental Declarations of  
26 Christa A. Thornton-Smith and Douglas King.

1           In the alternative, Blue Sky and Brink request that I strike  
2 Paragraph 22 from the Supplemental Declaration of Douglas King as  
3 offering legal conclusions. In its opposition to Defendants' Motion to  
4 Strike, LT Builders does not object to my striking Paragraph 22 from  
5 Mr. King's supplemental declaration with the exception of one factual  
6 statement: "If Defendants are now permitted to assert late claims to  
7 LTB's inventory and assets, LTB will dispute Defendants' ownership of  
8 each and every item." I will grant the Defendants' Motion to Strike  
9 Paragraph 22 from the Supplemental Declaration of Douglas King in its  
10 entirety because it includes primarily legal conclusions, but as to the  
11 factual statement at issue, I find that it does not have any conceivable  
12 relevance to the matters I am called upon to decide in resolving the  
13 Summary Judgment Motion.

14           As I stated at the Hearing, I tend to bend over backwards to  
15 admit evidence that is opposed on relevance grounds so long as it has any  
16 relevance at all to the matters I need to decide because I can consider  
17 the relative weight of such evidence in making my decisions. In this  
18 case, the explicit threat in the contested statement is based on what  
19 Mr. King says LT Builders will do if I decide this adversary proceeding  
20 in a certain way. Based on how this litigation has been conducted, with  
21 plenty of scorched earth on both sides, I would have thought that threat  
22 would have been implicit. In any event, I reiterate my conclusion that  
23 Mr. King's factual statement in Paragraph 22 of his supplemental  
24 declaration has no relevance whatsoever to my decision of the Summary  
25 Judgment Motion.

26 ///

1 B) Hice Motion to Strike

2 LT Builders moves to strike the Declaration of David Hice on  
3 the grounds that 1) its factual statements are irrelevant; 2) it is  
4 inadmissible based on the parol evidence rule; and 3) it constitutes an  
5 unqualified expert opinion. First, while the facts attested to in  
6 Mr. Hice's declaration may have only limited relevance to my decision of  
7 the Summary Judgment Motion, I find that they are relevant, and I can  
8 assess their weight in determining whether a genuine issue of material  
9 fact has been raised that would preclude entry of summary judgment. As  
10 to the parol evidence rule, it comes from state law and applies generally  
11 to disputes concerning whether interpretation evidence is admissible that  
12 may vary the terms of an integrated contract. The Summary Judgment  
13 Motion requires that I interpret the terms of orders that I have issued  
14 in the Aircraft Investor Resources, LLC main case. The parol evidence  
15 rule would apply in this instance, if at all, by analogy only, and I do  
16 not find that it would preclude my consideration of the statements  
17 contained in Mr. Hice's declaration. Finally, the statements in  
18 Mr. Hice's declaration are based on his personal knowledge and experience  
19 based on his connections with and employment by Aircraft Investor  
20 Resources, LLC, and its affiliated entities. I do not find that the  
21 David Hice Declaration includes unqualified expert opinions inadmissible  
22 under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).  
23 Accordingly, I will deny the Hice Motion to Strike.

24 C) Emerson Motion to Strike

25 In the Emerson Motion to Strike, LT Builders moves to strike  
26 paragraph 18 of the Declaration of Ashley Emerson on the grounds that 1)

1 it lacks foundation; 2) the statements included are not based on  
2 Mr. Emerson's personal knowledge; and 3) the statements included appear  
3 to be based on inadmissible hearsay. In Paragraph 18 of his declaration,  
4 Mr. Emerson states that he has "become aware" of certain information,  
5 without stating how, from whom and under what circumstances he became  
6 aware of that information. He also states that he has "learned" about  
7 the conduct of certain other builders without stating how, from whom or  
8 under what circumstances he learned about such conduct. I find that LT  
9 Builders' objections are well taken, and I will grant the Emerson Motion  
10 to Strike.

11 D) Lucibella Motion to Strike

12 LT Builders moves to strike a number of paragraphs from the  
13 Declaration of Richard Lucibella on a variety of grounds. I will deal  
14 with the objections to particular paragraphs in the sequence discussed in  
15 the Lucibella Motion to Strike.

16 LT Builders moves to strike Paragraphs 6, 10, 12-15 and 34 on  
17 the basis of lack of relevance. To the contrary, Paragraphs 6, 10, and  
18 12-15 are based on Mr. Lucibella's personal knowledge and provide useful  
19 and relevant background information as to the disputes between the  
20 parties. I will deny LT Builders' motion to strike as to Paragraphs 6,  
21 10, and 12-15 of Mr. Lucibella's declaration. I will grant LT Builders'  
22 motion to strike Paragraph 34, but on grounds other than relevance, as  
23 discussed infra.

24 LT Builders moves to strike Paragraphs 16-17, 35, and 37-44  
25 based on the parol evidence rule. As I stated previously, I find the  
26 parol evidence rule of limited application in relation to the Summary

1 Judgment Motion, as it applies, if at all, only by analogy. In  
2 Paragraphs 16-17, 35, and 38-42, Mr. Lucibella makes statements based  
3 either on personal knowledge or on his interpretation of the inventory  
4 order entered by this court, reflecting his understanding of matters  
5 relevant to the issues raised in this adversary proceeding. Since I am  
6 called upon to interpret the subject inventory order in deciding the  
7 Summary Judgment Motion, Mr. Lucibella's interpretations are relevant and  
8 not precluded by the parol evidence rule, or as improper opinion  
9 testimony, for that matter. Accordingly, I will deny LT Builders' motion  
10 to strike as to Paragraphs 16-17, 35, and 38-42. I will grant LT  
11 Builders' motion to strike as to Paragraphs 37, and 43-44, but on the  
12 grounds that no adequate foundation has been laid for the statements  
13 included in Paragraphs 37, and 43-44 to establish that they are based on  
14 Mr. Lucibella's personal knowledge, and with respect to Paragraph 44, it  
15 includes legal conclusions that Mr. Lucibella is not qualified to present  
16 as evidence.

17 LT Builders moves to strike Paragraphs 10, 16-17, 26, and 37-44  
18 as expert opinion where the appropriate foundation for expert opinion has  
19 not been laid. I find nothing objectionable in Mr. Lucibella's lay  
20 opinions set forth in Paragraphs 10, 16-17, 26, or 38-42. As previously  
21 stated, I will grant the Lucibella Motion to Strike as to Paragraphs 37,  
22 and 43-44, but with the exception of a portion of Paragraph 44, on  
23 grounds other than improper opinion testimony.

24 LT Builders moves to strike the e-mails attached to  
25 Mr. Lucibella's declaration as not complete and not authentic. I  
26 conclude that Mr. Lucibella can properly authenticate e-mails from his

1 own e-mail records, and accordingly, I will deny the motion to strike the  
2 subject e-mails.

3 Finally, LT Builders moves to strike Paragraphs 31-34, and 39  
4 as not based on Mr. Lucibella's personal knowledge and/or hearsay, with  
5 no proper foundation laid for their admission. Paragraphs 31-34 are all  
6 based on the knowledge of Mr. Emerson. This is territory covered by  
7 Mr. Emerson in his declaration. Therefore, I will grant LT Builders'  
8 motion to strike Paragraphs 31-34. With regard to Mr. Lucibella's  
9 independent personal knowledge, I find that LT Builders' objections are  
10 well taken. Paragraph 39 reflects personal knowledge of Mr. Lucibella  
11 that was shared in the deposition of Ms. Thornton-Smith. I will deny the  
12 Lucibella Motion to Strike as it pertains to Paragraph 39.

13 Conclusion

14 Based on the foregoing findings and conclusions, a) I will deny  
15 Defendants' Motion to Strike except as to paragraph 22 in the  
16 Supplemental Declaration of Douglas King; b) I will deny the Hice Motion  
17 to Strike; c) I will grant the Emerson Motion to Strike; and d) I will  
18 deny the Lucibella Motion to Strike as it pertains to Paragraphs 6, 10,  
19 12-17, 26, 35, and 38-42 of Mr. Lucibella's declaration, and I will grant  
20 the Lucibella Motion to Strike as it pertains to Paragraphs 31-34, 37,  
21 and 43-44. An order consistent with this Memorandum Opinion will be  
22 entered contemporaneously.

23 ###

24 cc: Susan S. Ford  
25 Timothy A. Solomon  
26 Marjorie A. Elken  
Lisa M. Schiller  
Norman Malinski